Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

ANDREW J. KEHOE, JR. and JENNIFER KEHOE
Petitioners

v.

GARY CRUICKSHANK
Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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59 pg

QUESTIONS PRESENTED FOR REVIEW

In this case the bankruptcy court determined that properties held by two trusts established seventeen years prior to the debtors' bankruptcy were properties of the bankruptcy estate even though debtors were merely trustees of those trusts and both of the trusts had terminated prior to this determination; one of the trusts had terminated four years prior to debtors' bankruptcy filing and the other trust terminated one year prior to the conversion of debtors' bankruptcy from Chapter 11 to Chapter 7. Subsequently, the bankruptcy court granted the Chapter 7 Trustee's motions to sell the properties over the objections of the beneficiaries of those trusts.

The beneficiaries appealed. The First Circuit dismissed the appeals because appellants did not obtain a stay of the orders authorizing the sales even though the court could grant effective relief without affecting the validity of the sales because the proceeds of those sales are still being held by the Chapter 7 Trustee.

1. Whether 11 U.S.C. §363(m) mandates that an appeal be dismissed if no stay has been obtained even though the court could grant effective relief without affecting the validity of the sale.

2. Whether the ability of a court to grant a measure of effective relief without affecting the validity of the sale prohibits the court from dismissing an appeal even though no stay was obtained.

3. Whether the Due Process Clause of the Fifth Amendment to the United States Constitution requires that a Bankruptcy Trustee file an Adversary Proceeding, as is

required by Bankruptcy Rule 7001, to obtain a determination by the bankruptcy court that property held by a trust is property of the bankruptcy estate when the beneficiaries of the trust are not the debtors in bankruptcy and the property had been placed in trust seventeen (17) years prior to debtors' bankruptcy.

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BASIS FOR JURISDICTION

The judgment of the First Circuit was entered on March 5, 2002. The order denying rehearing was entered on April 5, 2002. The jurisdiction of this Court is conferred by 28 U.S.C. §1254(l).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Amendment V to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation. (Emphasis added)

11 U.S.C. §363 Use, sale, or lease of property:

See Appendix pg. A-25.

11 U.S.C. §541. Property of the estate:

See Appendix pg. A-32.

Bankruptcy Rule 7001. Scope of Rules of Part VII:

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings: (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002; (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d); (3) a proceeding to obtain approval pursuant to §363(h) for the sale of both the interest of the estate and of a co-owner in property; (4) a proceeding to object to or revoke a discharge; (5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan; (6) a proceeding to determine the dischargeability of a debt; (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief; (8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination; (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or (10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452,

Bankruptcy Rule 7003. Commencement of Adversary Proceeding:

Rule 3 F.R.Civ.P. applies in adversary proceedings.

Federal Rule of Civil Procedure Rule 3. Commencement of Action:

A civil action is commenced by filing a complaint with the court.

STATEMENT OF THE CASE

Basis for jurisdiction in the Bankruptcy Court:

The bankruptcy court had jurisdiction in this matter pursuant to 28 U.S.C. §1334.

Facts:

On November 21, 1979, Andrew J. Kehoe, [Sr.] and Catherine M. Kehoe established the JK Realty Trust for the benefit of their daughter, Jennifer Kehoe. The JK Realty Trust was registered and recorded with the Registry of Deeds in Suffolk County, Massachusetts on November 23, 1979 in Book 457, Page 32, No. 92232, Certificate No. 80857. The JK Realty Trust continued until Jennifer Kehoe reached the age of twenty-one (21) years on April 28, 1992. Catherine M. Kehoe was the Trustee of the JK Realty Trust.

Also on November 21, 1979, Andrew J. Kehoe, [Sr.] and Catherine M. Kehoe established the Laifield-Bearse Realty Trust for the benefit of their son, Andrew J. Kehoe, Jr. The Laifield-Bearse Realty Trust was registered and recorded with the Registry of Deeds in Suffolk County, Massachusetts on November 26,1979 in Book 9316 page 311. The Laifield-Bearse Realty Trust continued until Andrew J. Kehoe, Jr. reached the age of twenty-one (21) years on August 4,1996.

Andrew J. Kehoe, [Sr.] was the Trustee of the Laifield-Bearse Realty Trust.

On January 25, 1996, Andrew J. Kehoe, [Sr.] and Catherine M. Kehoe filed Chapter 11 Bankruptcy. On September 23, 1997 the debtors' Chapter 11 was converted to Chapter 7 when the bankruptcy court granted the Motion to Convert Case from Chapter 11 to Chapter 7 filed by Meetinghouse Cooperative Bank. Jennifer Kehoe had reached the age of 21 on April 28, 1992 almost four years prior to her parents' bankruptcy fiiing on January 25, 1996 and Andrew J. Kehoe, Jr. had reached the age of 21 on August 4, 1996 over one year prior to the conversion of his parents' bankruptcy from Chapter 11 to Chapter 7.

On August 20, 1999, the Chapter 7 Trustee filed a Motion for Entry of an Order Determining that Properties held by the JK Realty Trust and Lafield-Bearse Realty Trust are Property of the Estate or Alternatively for an Order Authorizing Revocation of Such Trusts. On September 10, 1999 debtors filed an objection to the Trustee's motion.

A hearing on the Trustee's motion was held on September 15, 1999 and on September 23, 1999 the bankruptcy court entered an order determining that properties held by the JK Realty Trust and Lafield-Bearse Realty Trust are property of the debtors' estate.

On December 28, 1999 the Chapter 7 Trustee filed a Motion to Sell 5 Bearse Avenue, Dorchester, Massachusetts Free and Clear of Liens, Encumbrances and Other Interests; 5 Bearse Avenue was the property held by the Lafield-Bearse Realty Trust.

On February 2, 2000 Andrew J. Kehoe, Jr., the beneficiary of the Lafield-Bearse Realty Trust and Jennifer M. Kehoe filed an objection to the Trustee's motion. Also on February 2, 2000 the Debtors, Andrew J. Kehoe, [Sr.] and Catherine M. Kehoe filed an objection to the Trustee's motion.

On February 9, 2000 a hearing was held and the bankruptcy court granted the Trustee's motion and entered an Order on Chapter 7 Trustee's Motion for Authority to Sell Real Property at Private Sale Free and Clear of Liens, Encumbrances and Other Interests (Re: 5 Bearse Avenue, Dorchester, Massachusetts) authorizing the sale of 5 Bearse Avenue. On February 18, 2000 the bankruptcy court entered an amended order wherein the court noted the objections filed by Andrew J. Kehoe, Jr., Jennifer M. Kehoe and the debtors, Andrew J. Kehoe [Sr.] and Catherine M. Kehoe but stated that the objections were overruled.

Andrew J. Kehoe, Jr. and Jennifer M. Kehoe appealed the decision of the bankruptcy court authorizing the sale of 5 Bearse Avenue to the district court. On October 13, 2000 Jennifer M. Kehoe and Andrew J. Kehoe, Jr. filed a Motion to Stay Order Regarding Motion to Sell 5 Bearse Avenue. On November 11, 2000 the court denied the motion to stay. On November 27, 2000 Jennifer M. Kehoe and Andrew J. Kehoe, Jr. filed a motion to stay with the district court. On December 11, 2000 the district court denied the motion to stay. On May 30, 2001, the district court denied the appeal and affirmed the bankruptcy court's order authorizing the sale of 5 Bearse Avenue. Andrew J. Kehoe, Jr. and Jennifer M. Kehoe appealed the decision to the First Circuit, Number 01-1864.

On March 3, 2000 the Chapter 7 Trustee filed a motion

to sell 555 Ashmont Street, Dorchester, Massachusetts, free and clear of liens, encumbrances and other interests; 555 Ashmont Street was the property held by the JK Realty Trust.

On April 3, 2000 Jennifer M. Kehoe, the beneficiary of the JK Realty Trust and Andrew J. Kehoe, Jr. filed an objection to the Trustee's motion to sell 555 Ashmont.

On April 10, 2000 the bankruptcy court granted the Trustee's motion and authorized the sale of 555 Ashmont by the Chapter 7 Trustee. On April 20, 2000 Jennifer M. Kehoe and Andrew J. Kehoe, Jr. filed an appeal to the district court. On October 25, 2000 the district court dismissed the appeal. Andrew J. Kehoe, Jr. and Jennifer M. Kehoe appealed the decision to the First Circuit, Number 00-2523.

The First Circuit Court of Appeals consolidated appeals 00-2523 and 01-1864. On March 5, 2002 the First Circuit entered Judgment dismissing the appeals as moot since appellants did not obtain a stay of the sale of the disputed properties. In the decision the First Circuit stated: "Nor are we inclined, on the facts of this case, to consider the 'measure of effective relief' exception to this general rule." On April 5, 2002 the First Circuit denied the request for a rehearing and/or rehearing en banc.

REASONS FOR GRANTING PETITION

Measure of Effective Relief Exception to 11 U.S.C. §363(m)

There are conflicts among the circuits in interpreting 11 U.S.C. §363(m) and in applying the "measure of effective

relief" exception to 11 U.S.C. §363(m).

The Fourth, Fifth and Eighth circuits have held that if an appellant has failed to obtain a stay of the disputed sale the appeal is moot. These circuits do not even address the "measure of effective relief" exception to 11 U.S.C. §363(m). They hold that 11 U.S.C. §363(m) bars an appeal if no stay is obtained. See *In re Adamson Company Inc.*, 159 F.3d 896 (4th Cir. 1998); *In Re Ginther Trusts* 238 F.3d 686 (5th Cir. 2001); and *In re Wintz Companies*, 219 F.3d 807 (8th Cir. 2000).

The Third, Seventh and Tenth circuits recognize the "measure of effective relief" exception to 11 U.S.C. §363(m) and will not dismiss the appeal of a bankruptcy court's order authorizing a sale pursuant to 11 U.S.C. §363(m) when no stay has been obtained if the court can grant some measure of effective relief.

The First Circuit does not recognize the measure of effective relief exception to 11 U.S.C. §363(m). Specifically, the Third, Seventh and Tenth circuits will not dismiss the appeal of a bankruptcy court's order authorizing a sale pursuant to 11 U.S.C. §363(m) if the court is able to afford the appellant with a "measure of effective relief" that would not affect the "validity of the sale", even though the appellant failed to stay the sale to a good faith purchaser. See *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998); *Matter of Lloyd* 37 F.3d 271, 273 (7th Cir. 1994); *In re BCD Corp.* 119 F.3d 852, 856 (10th Cir. 1997).

The decisions of the Third, Seventh and Tenth Circuits which hold that the Court will not dismiss an appeal of an order authorizing a sale pursuant to 11 U.S.C. §363(m) if the court is able to afford the appellant a "measure of effective relief" follow the Supreme Court's decision in *Church of Scientology of California v. United States,* 506 U.S. 9 (1992) where the United States Supreme Court held that compliance with a summons enforcement order did not moot the appeal because the availability of a possible remedy was sufficient to prevent the case from being moot. "While a court may not be able to return the parties to the status quo ante... a court can fashion some form of meaningful relief in circumstances such as these." *Church of Scientology of California v. United States* 506 U.S. 9, 12 (1992).

The Third Circuit in the case *In Re Swedeland Development Group, Inc.,* 16 F.3d 552 was faced with the issue of whether 11 U.S.C. §364(e) by its terms requires the dismissal of an appeal if the appellant does not obtain a stay. The language of 11 U.S.C. §364(e) has language which is identical to the language of 11 U.S.C. §363(m), which provides that "reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal." The Third Circuit in *Swedeland,* Id. held that section 364(e) by its terms does not require dismissal of an appeal if the appellant does not obtain a stay.

The Third Circuit in *Pittsburgh Food & Beverage v. Ranallo* 112 F.3d 645 (3rd Cir. 1997) was faced with the issue of whether appeal of an order approving a sale was moot under 11 U.S.C. §363(m) because appellant had not obtained a stay. The Third Circuit examined the decision of *In Re Swedeland Development Group, Inc.* 16 F.3d 552 (3rd Cir. 1994) and the Supreme Court's holding in *Church of Scientology of California v. United States* that "appeals should not be dismissed as moot unless the court cannot grant any relief upon a reversal or modification of the order appealed." *Pittsburgh Food & Beverage v. Ranallo,* 112 F.3d 645 (3rd Cir. 1997). The Third Circuit in *Pittsburgh Food & Beverage v. Ranallo* affirmed the dismissal only because the district court could not grant effective relief.

The Third Circuit in *Pittsburgh Food & Beverage v. Ranallo* did at least consider the "measure of effective relief" exception to 11 U.S.C. §363(m). The First Circuit in the case herein refused to even consider the "measure of effective relief" exception even though the proceeds of the disputed sales are still being held by the Chapter 7 Trustee and a "measure of effective relief" could have been granted. The District Court of Massachusetts in *In re Whistler Corporation of Massachusetts,* 243 B.R. 573 (D.Mass.2000) stated: "The First circuit has not ruled definitively whether it recognizes the "measure of effective relief" exception to section 363(m) ...Recent decisions of the First circuit suggest that it does not." In the instant case the First Circuit stated: "'Nor are we inclined, on the facts of this case, to consider the 'measure of effective relief' exception to this general rule." The First Circuit's decision based on their inclinations is a rather unreliable and unpredictable standard. The Supreme Court should set forth reliable and

predictable standards for all of the Circuits to follow with regard to whether or not the courts must consider the "measure of effective relief" exception to 11 U.S.C. §363(m). The Supreme Court should hold that if there is a "measure of effective relief" that could be granted to appellants an appeal of a disputed sale should not be dismissed as moot pursuant to 11 U.S.C. §363(m). In the case herein the court could grant appellants effective relief by ordering that the proceeds of the disputed sales be turned over to appellants.

Due Process

The Fifth Amendment to the United States Constitution provides that "no person shall be ... deprived of life, liberty, or property, without due process of law...." In this case the Chapter 7 Trustee filed a motion asking the bankruptcy court to determine that properties held by the JK Realty Trust and the Lafield-Bearse Realty Trust were properties of the bankruptcy estate even though the trusts had been established seventeen (17) years prior to the debtors' bankruptcy and the debtors were not beneficiaries of those trusts.

Bankruptcy Rule 7001 provides that:

> An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings: (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002; (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003 (d); (3) a

> proceeding to obtain approval pursuant to §363(h) for the sale of both the interest of the estate and of a co-owner in property; (4) a proceeding to object to or revoke a discharge; (5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan; (6) a proceeding to determine the dischargeability of a debt; (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief; (8) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or (10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452.

Bankruptcy Rule 7003 provides that Rule 3 F.R.Civ.P. applies in adversary proceedings. Rule 3 of the Federal Rules of Civil Procedure provides that '[a] civil action is commenced by filing a complaint with the court." Rule 4 of the Federal Rules of Civil Procedure provides in part that "[a] summons shall be served together with a copy of the complaint." Upon filing and service of the summons and complaint a defendant is given 20 days to file defenses and objections pursuant to Rule 12 of the Federal Rules of Civil Procedure. In an adversary proceeding a defendant is not only given adequate notice by the filing and service of the summons and complaint but is also able to conduct full discovery including depositions, interrogatories and requests for production. A defendant is given adequate opportunity to assert his rights and to defend himself to insure that this property is not taken without due process.

In this case the properties held by the JK Realty Trust and the Laifield-Bearse Realty Trust were not properties of the estate of Debtors. The properties had been placed in trust

on November 21, 1979 for the benefit of the debtors' children, Jennifer Kehoe and Andrew J. Kehoe, Jr. until the children reached 21 years of age. Jennifer Kehoe reached 21 years of age on April 28, 1992, four years prior to her parents' bankruptcy on January 25, 1996, and Andrew J. Kehoe, Jr. reached 21 years of age on August 4, 1996, over one year prior to the conversion of his parents' bankruptcy to Chapter 7.

Jennifer Kehoe as the sole beneficiary was the only person with a beneficial interest in the JK Realty Trust and became the vested owner of the property held by the JK Realty Trust on April 28,1992 when she reached the age of twenty-one.

Andrew J. Kehoe, Jr. as the sole beneficiary was the only person with a beneficial interest in the Laifield-Bearse Realty Trust and became the vested owner of the property held by the Laifield-Bearse Realty Trust on August 4, 1996 when he reached twenty-one.

The debtors, Andrew J. Kehoe, [Sr.] and Catherine M. Kehoe were merely Trustees of the Laifield-Bearse Realty Trust and the JK Realty Trust respectively. The debtors had no equitable interest in the properties held by the JK Realty Trust and the Laifield-Bearse Realty Trust.

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, ... becomes property of the estate ... only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. §541(d). Accordingly, the properties held by the JK Realty Trust and Laifield-Bearse Trust were not prop-

erties of the debtors' estate.

> With regard to property held by the debtor as trustee, '[t]he rule is elementary that the estate succeeds only to the title and rights in the property that the debtor possessed, although the trustee is armed, of course, with the special rights and powers conferred upon him by the Code itself. Therefore,..., the estate will generally hold such property subject to the outstanding interest of the beneficiaries.

Georgia Pacific Corp. v. Sigma Service Corp. 712 F.2d 962 (5th Cir. 1983). "We do not now decide the outer boundaries of the bankruptcy estate. We note only that Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition." Id.

The properties held by the JK Realty Trust and the Laifield-Bearse Realty Trust belonged to the beneficiaries of those trusts and were not properties of the estate of debtors. Jennifer Kehoe and Andrew J. Kehoe, Jr. were denied due process when the bankruptcy court determined that the properties were properties of the debtors' estate without an adversary proceeding.

Bankruptcy Rule 7001 requires that an adversary proceeding be filed to determine the validity, priority, or extent of a lien or other interest in property. The Fifth Amendment to the United States Constitution guarantees that a person's property shall not be taken without due process of law. In this case due process required that an adversary proceeding be filed before the bankruptcy court could determine that the properties held in trust for seventeen years were properties of the estate. In this case the properties were taken from the

beneficiaries without due process in violation of the Fifth Amendment. The First Circuit's holding in this case that since appellants received notice of all relevant actions before their rights were affected that there was no due process violation is wrong. The minimum due process requirements are set forth in Bankruptcy Rule 7001.

Bankruptcy Rule 7001 requires that for the court to determine whether the properties held by the JK Realty Trust and the Laifield-Bearse Realty Trust were properties of the debtors' estate or properties belonging to the beneficiaries an adversary proceeding had to have been filed and the beneficiaries had to be given an opportunity to assert their rights and present their case. The bankruptcy court denied Jennifer Kehoe and Andrew J. Kehoe, Jr. due process of law in violation of the Fifth Amendment to the United States Constitution when the bankruptcy court determined that the properties held by the JK Realty Trust and Laifield-Bears Realty Trust were properties of the estate of debtors without an adversary proceeding and granted the Trustee's motions for authority to sell real properties held by the JK Realty Trust and Laifield-Bearse Realty Trust without an adversary proceeding contrary to Bankruptcy Rule 7001.

The Fifth Amendment to the United States Constitution provides in part: "No person shall be ... deprived of life, liberty, or property, without due process of law ..... In this case the bankruptcy court made a determination that the properties held by the JK Realty Trust and the Laifield-Bearse Realty Trust were properties of the debtors' estate and authorized the sale of those properties without an adversary proceeding. The sole beneficiaries of those trusts: Jennifer Kehoe and Andrew J. Kehoe, Jr. were denied the opportunity to assert their rights

as owners of those properties; Jennifer Kehoe and Andrew J. Kehoe, Jr. were denied due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

> The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the /property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972); 92 S.Ct. 1113, 11 (1972), 31 L.Ed.2d 424 (1972).

In the case herein the First Circuit held that: "Since appellants received due notice of all relevant actions before their rights were affected, no due process violation occurred." Appellants received a motion and notice of non-evidentiary hearing to which they filed an objection. Bankruptcy Rule 7001 requires more than a motion and notice of non-evidentiary hearing before someone's interest in property may be taken away; it requires that a complaint be filed and that the defendant be served with a summons and complaint. The defendant is given an opportunity for discovery and the matter proceeds to trial where evidence is submitted by both sides so that a person is not deprived of their property wrongly. This is due process. The process afforded by the bankruptcy court and affirmed by the First Circuit was less than due process and violated appellant's rights under the Fifth Amendment.

CONCLUSION

The Petition for Writ of Certiorari should be granted to set forth reliable and predictable standards for applying the "measure of effective relief" exception to 11 U.S.C. §363(m) and to define what Due Process requires before a bankruptcy court can make a determination that property is property of the bankruptcy estate and authorize the sale of that property.

Respectfully submitted,

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APPENDIX A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

IN RE:	)	
	)	Chapter 7
ANDREW J. KEHOE and	)	
CATHERINE M. KEHOE,	)	Case No. 96-10559-WCH
	)	
Debtors	)	
	)	
	)	

ORDER DETERMINING THAT PROPERTIES
HELD BY THE JK REALTY TRUST AND
LAFIELD-BEARSE REALTY TRUST
ARE PROPERTY OF THE DEBTORS' ESTATE

This matter comes before this Court on the Trustee's Motion For An Order Determining That Properties Held By The JK Realty Trust And Lafield-Bearse Realty Trust Are Property Of The Estate, Or, Alternatively, For an Order Authorizing Revocation Of Such Trusts (the "Motion") and the notice of hearing thereon (the "Notice") wherein Gary W. JK Cruickshank, the Chapter 7 trustee (the "Chapter 7 Trustee"), seeks the entry of an order determining that certain real properties held by the X Realty Trust (the "JK Trust") and the Lafield-Bearse Realty Trust (the "Bearse Trust") are property of the bankruptcy estate of Andrew J. Kehoe and Catherine M. Kehoe, the above-entitled debtors

(the "Debtors"), or alternatively for entry of an order authorizing him to revoke the JK Trust and the Bearse Trust.

The Debtors, through their counsel, filed an objection to the Motion (the "Debtors' Objection"), wherein the Debtors, on various grounds, objected to the relief sought by the Trustee in the Motion. No other objections were.filed to the Motion.

On September 15, 1999, the Court conducted a hearing on the Motion and the Debtors' Objection thereto. After consideration of the submissions of the parties, arguments presented at the hearing, and the record in this proceeding,- and for the reasons, findings and rulings read into the record by the Court at the conclusion of the September 15, 1999 hearing, it is hereby:

FOUND:

1. That proper, timely and sufficient notice of the Motion and the hearing thereon was provided by the Trustee to the Debtors, the Debtors' children, Jennifer Kehoe and Andrew Kehoe, Jr., and to all parties in interest.

2. On January 26, 1996, the Debtors filed a joint voluntary petition under Chapter 11 of the Bankruptcy Code. On September 23, 1997 (the "Conversion Date"), the Debtors' Chapter 11 proceeding was converted to a Chapter 7 case. Gary W. Cruickshank is the duly qualified and acting successor Chapter 7 trustee of the Debtors.

3. As of the Conversion Date, the Debtors' assets included, inter alia, interests in certain trusts, namely, the JK

Trust and the Bearse Trust. Each of the trusts holds the title to a parcel of real property and the improvements situated thereon. Catherine M. Kehoe, as trustee of the JK Trust, holds record title to the real property located at 555 Ashmont Street, Dorchester, Massachusetts (the "Ashmont Property"). Andrew J. Kehoe, as trustee of the Bearse Trust, holds record title to the real property located at 5 Bearse Avenue, Dorchester, Massachusetts (the "Bearse Property").

4. The Debtors assert that they hold only the "legal interest" in the JK Trust and the Bearse Trust (collectively, the "Trusts"), and that the beneficial interests in such trusts are held by the Debtors' children, Jennifer Kehoe and Andrew Kehoe, Jr. Specifically, the Debtors allege that Jennifer holds the beneficial interest in the JK Trust and that Andrew Kehoe, Jr. holds the beneficial interest in the Bearse Trust.

5. Based upon substantial and undisputed evidence relating to the historical conduct of the Debtors, who have consistently held themselves out as the true owners of the Ashmont Property and the Bearse Property (collectively, the "Properties"), the Court finds that the Trusts are shams. Indeed, for all purposes, in all fora, and at all times except now, the Debtors have always treated the Properties as their own. Therefore, the property held by the Trusts, namely the Ashmont Property and the Bearse Property are property of the Debtors' estate.

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED that:

1. The Debtors' Objection to the Motion is hereby OVERRULED.

2. The Trustee's Motion is hereby ALLOWED.

3. The JK Trust and the Bearse Trust are shams, and the property held by each trust, namely the Ashmont Property and the Bearse Property are property of the Debtors' estate.

Dated at Boston, Massachusetts, this **23rd** day of **September**, 1999.

/s/ William C. Hillman
William C. Hillman
Chief Judge of the United States
Bankruptcy Court

APPENDIX B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

IN RE:	)	
	)	Chapter 7
ANDREW J. KEHOE AND	)	
CATHERINE M. KEHOE,	)	Case No. 96-10559-WCH
	)	
Debtors	)	
	)	

ORDER ON CHAPTER 7 TRUSTEE'S MOTION FOR AUTHORITY TO SELL REAL PROPERTY AT PRIVATE SALE FREE AND CLEAR OF LIENS, ENCUMBRANCES AND OTHER INTERESTS
(RE: 5 BEARSE AVENUE, DORCHESTER, MASSACHUSETTS)

This matter having come before the Court on the Chapter 7 Trustee's Motion For Authority To Sell Property At Private Sale Free And Clear Of Liens, Encumbrances And Other Interests (the "Motion To Sell") and the Notice thereon, wherein Gary W. Cruickshank, the successor Chapter 7 trustee (the "Trustee") of the above-entitled debtors (the "Debtors") has sought authority to sell all of the estate's right, title and interest in and to the real property located at 5 Bearse Avenue, Dorchester, Massachusetts (the "Bearse Avenue Property"), all as more specifically set forth in the Motion To Sell, to Robert Alessandro of South Walpole, Massachusetts (the "Buyer") for the sum of $180,000.00,

due and proper notice having been given, and no objections or higher counteroffers having been timely filed, and good cause appearing therefor, it is hereby:

ORDERED, ADJUDGED AND FOUND:

1 . That the Motion To Sell is ALLOWED.

2. That the Trustee be, and hereby is, authorized to sell to the Buyer all of the estate's right, title, and interest in and to the Bearse Avenue Property.

3. That the sale of the Bearse Avenue Property shall be free and clear of all liens, encumbrances and interests of any kind (other than certain permitted exceptions specifically set forth in the Purchase And Sale Agreement), with any valid, perfected and unavoidable liens, encumbrances and interests attaching to the proceeds of the sale in their order of priority.

4. That the consideration to be paid to the Trustee for the Bearse Avenue Property is fair and reasonable and constitutes "fair value", and that the Buyer is a good faith purchaser within the meaning of Section 363(m) of the Bankruptcy Code.

5. That the Trustee is authorized to execute and deliver any documents and instruments as he deems necessary and appropriate to effectuate the proposed sale.

Dated at Boston, Massachusetts, this **9th** day of **February,** 2000.

/s/ William C. Hillman
William C. Hillman, Chief Judge of the
United States Bankruptcy Court

APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

IN RE:	)	
	)	Chapter 7
ANDREW J. KEHOE AND	)	
CATHERINE M. KEHOE,	)	Case No. 96-10559-WCH
	)	
Debtors	)	

AMENDED ORDER ON CHAPTER 7 TRUSTEE'S MOTION FOR AUTHORITY TO SELL REAL PROPERTY AT PRIVATE SALE FREE AND CLEAR OF LIENS ENCUMBRANCES AND OTHER INTERESTS (RE: 5 BEARSE AVENUE, DORCHESTER, MASSACHUSETTS)

This matter having come before the Court on the Chapter 7 Trustee's Motion For Authority To Sell Property At Private Sale Free And Clear Of Liens, Encumbrances And Other Interests (the "Motion To Sell") and the Notice thereon, wherein Gary W. Cruickshank, the successor Chapter 7 trustee (the "Trustee") of the above-entitled debtors (the "Debtors") has sought authority to sell all of the estate's right, title and interest in and to the real property located at 5 Bearse Avenue, Dorchester, Massachusetts (the "Bearse Avenue Property"), all as more specifically set forth in the Motion To Sell, to Robert Alessandro of South Walpole,

Massachusetts (the "Buyer") for the sum of $180,000.00.

Objections to the Trustee's Motion To Sell were filed by Andrew J. Kehoe Jr. and Jennifer M. Kehoe, the children of the Debtors (the "Debtors' Children") and by the Debtors. Each objection asserted various grounds why the Motion To Sell should not be granted. In addition, a creditor, Sharon Nauss ("Nauss") filed a limited objection to the Motion To Sell (the "Nauss Limited Objection"). Nauss did not object to the proposed sale of the Bearse Avenue Property to the Buyer; rather, Nauss requested that subsequent to the sale, the Trustee segregate the sum of $61,728.09 of the sale proceeds, and pay such amount to Nauss as a partial dividend. There were no timely filed counteroffers to the proposed sale to the Buyer.

On February 9, 2000, the Court conducted a hearing on the Motion To Sell and the objections filed by the Debtors' Children, the Debtors and the limited objection filed by Nauss. After consideration of the submissions of the parties, arguments presented at the hearing, and the record in this proceeding, and for the reasons, findings and rulings read into the record by the Court at the conclusion of the February 9, 2000 hearing, it is hereby:

ORDERED, ADJUDGED AND FOUND:

1. That proper, timely and sufficient notice of the Motion To Sell and the hearing thereon was provided by the Trustee.

2. That the objections filed by the Debtors' Children and by the Debtors to the Motion To Sell are hereby OVERRULED.

3. That the Trustee's Motion To Sell is hereby ALLOWED.

4. That the Trustee be, and herby is, authorized to sell the Bearse Avenue Property to the Buyer, as contemplated by the Purchase and Sale Agreement dated December 27, 1999 between the parties (the "Purchase Agreement"), pursuant to Section 363 of the Bankruptcy Code.

5. That the sale of the Bearse Avenue Property shall be free and clear of all liens, encumbrances and interests of any kind (other than certain permitted exceptions specifically set in the Purchase Agreement), with any valid, perfected and unavoidable liens, encumbrances and interests attaching to the proceeds of the sale in their order of priority.

6. That the consideration to be paid to the Trustee for the Bearse Avenue Property is fair and reasonable and constitutes "fair value", and that the Buyer is a good faith purchaser within the meaning of Section 363(m) of the Bankruptcy Code.

7. That the Trustee is authorized to take any and all actions necessary or appropriate to consummate the sale of, the Bearse Avenue Property as contemplated in the Purchase Agreement, including, without limitation: (i) the execution and delivery of such instruments of title and other documents as are appropriate; (ii) the payment of customary and ordinary closing costs incurred by a seller; (iii) the satisfaction of any outstanding real estate taxes, municipal liens, or other valid liens or mortgages on the Bearse Avenue Property.

8. That in the event that the sale of the Bearse Avenue

Property to the Buyer is consummated, the Trustee is authorized to pay to Michael McSweeney of RE/MAX Landmark a broker's commission of five percent (5%) of the purchase price of the Bearse Avenue Property, namely $9,000.

9. That the Nauss Limited Objection is denied without prejudice. However, from the net proceeds of the sale of the Bearse Avenue Property, the Trustee shall segregate the sum of $61,728.09, and hold such amount in escrow pending further order of this Court.

10. That the Court shall and hereby does retain sole and exclusive jurisdiction to determine any dispute, issue or matter arising under this Order.

Dated at Boston, Massachusetts, this **18th** day of **February**, 2000.

/s/ William C. Hillman
William C. Hillman, Chief Judge of the
United States Bankruptcy Court

APPENDIX D

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

IN RE:	)	
	)	Chapter 7
ANDREW J. KEHOE and	)	
CATHERINE M. KEHOE,	)	Case No. 96-10559-WCH
	)	
Debtors	)	

ORDER ON CHAPTER 7 TRUSTEE'S MOTION FOR AUTHORITY TO SELL REAL PROPERTY AT PRIVATE SALE FREE AND CLEAR OF LIENS, ENCUMBRANCES AND OTHER INTERESTS
(RE: 555 ASHMONT STREET, DORCHESTER, MASSACHUSETTS)

This matter having come before the Court on the Chapter 7 Trustee's Motion For Authority To Sell Real Property At Private Sale Free And Clear Of Liens, Encumbrances And Other Interests (the "Motion To Sell") and the Notice thereon, wherein Gary W. Cruickshank, the successor Chapter 7 trustee (the "Trustee") of the above-named debtors (the "Debtors") sought authority to sell all of the estate's right, title and interest in and to the real property and improvements thereon located at 555 Ashmont Street, Dorchester, Massachusetts (the "Ashmont Street Property"), all as more specifically set forth in the Motion To Sell, to

Gene Flynn ("Flynn") for the sum of $169,900.00.

An objection to the Trustee's Motion To Sell was filed by Andrew J. Kehoe, Jr. and Jennifer M. Kehoe, the children of the Debtors (the "Debtors' Children"). The objection filed by the Debtors' Children asserted various grounds why the Motion To Sell should not be granted. No other objections were timely filed to the Motion To Sell. In addition, a counteroffer in the amount of $178,400.00 was timely submitted by Timothy P. O'Callaghan ("O'Callaghan"). The counteroffer submitted by O'Callaghan was made on the same terms and conditions set forth in the Purchase And Sale Agreement between the Trustee and Flynn dated February 24, 2000 (the "Purchase Agreement"), except for the purchase price.

On April 5, 2000, the Court conducted a hearing on the Motion To Sell, the objections thereto, and to provide the original offeror, Flynn, and the counterofferor, O'Callaghan, an opportunity to submit further sealed bids for the Ashmont Street Property. After consideration of the submissions of the parties, the arguments presented at the hearing, and the record in this proceeding, and for the reasons, findings and rulings read into the record by the Court at the conclusion of the April 5,200 hearing, it is hereby:

ORDERED, ADJUDGED AND FOUND:

1 . That proper, timely and sufficient notice of the Motion To Sell and the hearing thereon was provided by the Trustee.

2. That the objection filed by the Debtors' Children is hereby OVERRULED.

3. That pursuant to the sealed bid procedure, the Court has determined that O'Callaghan who bid the sum of $186,900.00 was the high bidder for the Ashmont Street Property. The sealed bid submitted by the original offeror, Flynn, was in the amount of $180,000.00.

4. That the Trustee be, and hereby is, authorized to sell the Ashmont Street Property to O'Callaghan for the sum of $186,900.00, pursuant to Section 363 of the Bankruptcy Code.

5. That the sale of the Ashmont Street Property to O'Callaghan shall be free and clear of all liens, encumbrances and interests of any kind (other than certain permitted exceptions specifically set forth in the Purchase Agreement), with any valid, perfected and unavoidable liens attaching to the proceeds of the sale in their order of priority.

6. That the consideration to be paid to the Trustee for the Ashmont Street Property is fair and reasonable and constitutes "fair value", and that O'Callaghan is a good faith purchaser within the meaning of Section 363(m) of the Bankruptcy Code, and is therefore entitled to the protection of that provision.

7. That the proposed sale to O'Callaghan is in the best interest of the creditors and the Debtors' estate.

8. That the Trustee is authorized to take any and all actions necessary or appropriate to consummate the sale of the Ashmont Street Property as contemplated in the Purchase Agreement, including, without limitation: (i) the execution and delivery of such instruments of title and other

documents as are appropriate; (ii) the payment of customary and ordinary closing costs incurred by a seller, (iii) the satisfaction of any outstanding real estate taxes, municipal liens, or other valid liens or mortgages on the Ashmont Street Property, including without limitation, the mortgage held by the Massachusetts Cooperative Bank.

9. That in the event that the sale of the Ashmont Street Property to O'Callaghan is consummated, the Trustee is authorized to pay to Michael McSweeney of RE/MAX Landmark a broker's commission equal to two and one-half percent (2 1/2%) of the purchase price of the Ashmont Street Property, namely, $4,672,50.

16. That in the event that O'Callaghan is not able to consummate the proposed purchase of the Ashmont Street Property, the Trustee is authorized to accept the offer of $180,000.00 submitted by Flynn for the Ashmont Street Property, if such offer is still available, without the need of re-noticing the sale of the Ashmont Street Property.

11. That the Court shall, and hereby does, retain sole and exclusive jurisdiction to determine any dispute, issue or matter arising under this Order.

Dated at Boston, Massachusetts, this **18th** day of **April,** 2000.

/s/ William C. Hillman
William C. Hillman, Chief Judge
of the United States Bankruptcy Court

APPENDIX E

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

IN RE:	)	
	)	Chapter 7
ANDREW J. KEHOE AND	)	
CATHERINE M. KEHOE,	)	Case No.: 96-10559-WCH
	)	
Debtors	)	
	)	

MOTION OF INTERESTED PARTIES TO STAY ORDER PENDING APPEAL

Jennifer M. Kehoe and Andrew J. Kehoe, Jr. (the "Kehoe Children"), parties in interest in the above-entitled action hereby move the court for an order staying, enforcement of the Amended Order on Chapter 7 Trustee's Motion For Authority To *Sell Real Property At Private Sale Free And Clear Of Liens,* Encumbrances And Other Interests (Re: 5 Bearse Avenue, Dorchester, Massachusetts) entered herein by this court on February 18, 2000 and any other proceedings in connection with matters in this action, pending the disposition of their appeal no: 00-CV-10683, from such order to the United States District Court for the District of Massachusetts. Such stay is required because:

1. On January 25, 1996, Andrew J. Kehoe and Catherine M. Kehoe (the "Debtors") filed a joint voluntary

petition under Chapter 11 of the Bankruptcy Code. On September 23, 1997, the Debtors' Chapter 11 proceeding was converted to a Chapter 7 case.

2. On August 20, 1999, Gary W. Cruickshank (the "Trustee") filed the Trustee's Motion For Entry Of An Order Determining That Properties Held By The JK Realty

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE:	)	
	)	Bankruptcy Appeal
ANDREW J. KEHOE AND	)	Civil Action No: 00-CV-10683
	)	
CATHERINE M. KEHOE,	)	Chapter 7
	)	Case No: 96-10559-WCH
Debtors	)	
	)	

MOTION OF INTERESTED PARTIES
TO STAY ORDER PENDING APPEAL

Jennifer M. Kehoe and Andrew J. Kehoe, Jr. (the "Kehoe Children"), parties in interest in the above-entitled action hereby move the court for an order staying enforcement of the Amended Order on Chapter 7 Trustee's Motion For Authority To Sell Real Property At Private Sale Free And Clear Of Liens, Encumbrances And Other Interests (Re: 5 Bearse Avenue, Dorchester, Massachusetts) entered herein by this court on February 18, 2000 and any other proceedings in connection with matters in this action, pending the disposition of their appeal no: 00-CV-10683, from such order to the United States District Court for the District of Massachusetts. Such stay is required because:

1. Appellants represented by the undersigned counsel, who first filed his Appearance in this Court on October 6, 2000, are seeking a motion to stay (5 Bearse Avenue) as we have previously filed an identical Motion to Stay in the U.S. Bankruptcy Court and Judge Hillman has denied our motion on the basis that it was filed untimely. The original Amended Order on Chapter 7 Trustee's Motion For Authority to Sell Real Property At Private Sale Free And Clear of Liens, Encumbrances And Other Interests

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: ANDREW J. KEHOE
AND CATHERINE M. KEHOE

CIVIL ACTION NO. 00-11146-RCL

JUDGMENT OF DISMISSAL

LINDSAY, D.J.

In accordance with the Court's order of October 25, 2000 allowing the motion to dismiss of the appellee Gary W. Cruickshank, Judgment is hereby entered as follows: Judgment for the Appellee Gary W. Cruickshank dismissing this action.

October 25, 2000

/s/ Lisa M. Hounka
Deputy Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE:	)	
ANDREW J. KEHOE and CATHERINE M. KEHOE	)	Civil Action No. 00-CV-10683
Debtors	)	

ORDER

The appellants, Andrew J. Kehoe, Jr. and Jennifer M. Kehoe, appeal a Bankruptcy Court Order granting the Bankruptcy Trustee's motion to sell real property. Although the procedure followed in connection with the Trust Motion was inconsistent with Fed. R. Bankr. P. 7001, the appellants have failed to demonstrate that they were prejudiced by the lack of an adversary proceeding. *See Tully Construction Company, Inc., v. Cannonsburg, Environmental Associates, Ltd. (In re Cannonsburg)* 72 F.3d 1260, 1264-65 (6th Cir. 1996). Therefore the appeal is denied and the Order is AFFIRMED.

So ordered.

/s/ illegible
United States District Judge

Date: 5/30/01

APPENDIX I

UNITED STATES COURT OF APPEALS
For the First Circuit

Nos. 00-2523
01-1864

IN RE: ANDREW J. KEHOE; CATHERINE M. KEHOE,

Debtors,

ANDREW J. KEHOE, JR; JENNIFER M. KEHOE,

Plaintiffs, Appellants,

v.

GARY CRUICKSHANK, ET AL.,

Defendants, Appellees.

Before

Boudin, Chief Judge,
Torruella and Lipez, Circuit Judges.

JUDGMENT

Entered: March 5, 2002

Having carefully reviewed the record in this cases, including the briefs of the parties, we affirm the orders of the bankruptcy court. We add only the following.

Since appellants did not obtain a stay of the sale of the disputed properties, most of their claims to this court have been rendered moot. In re Stadium Management Corp., 895 F.2d 845, 847 (1st Cir. 1990). Nor are we inclined, on the facts of this case, to consider the "measure of effective relief" exception to this general rule. See In re Whistler Corp. of Massachusetts, 243 B.R. 573, 574 (D. Mass. 2000).

Since appellants received due notice of all relevant actions before their rights were affected, no due process violation occurred. See Raskin v. Malloy, 231 B.R. 809, 814 (N.D. Okla. 1997) , aff'd 172 F.3d 63 (10th Cir. 1999); Huddleston v. Nelson Bunker Hunt Trust Estate, 109 B.R. 197, 201.

Finally, appellants' objections to the bankruptcy court decisions are insufficient to call into question the good faith of the purchasers who relied on those decisions. See, e.g., Greylock Glen Corp. v. Community Sav. Bank, 656 F.2d 1, 4 (1st Cir. 1981); In re EDC Holding Co., 676 F.2d 945, 946 (7th Cir. 1982).

Affirmed. See 1st Cir. Loc. R. 27 (c) .

By the Court
Richard Cushing Donovan, Clerk

By: **JANICE M. O'NEIL**
Chief Deputy Clerk.

[cc: Messrs. Jacobi, McPherson, Schillesci, Gross, Zyfers and Altman]

APPENDIX J

UNITED STATES COURT OF APPEALS
For the First Circuit

Nos.00-2523
01-1864

IN RE: ANDREW J. KEHOE; CATHERINE M. KEHOE,

Debtors,

ANDREW J. KEHOE, JR; JENNIFER M. KEHOE,

Plaintiffs, Appellants,

v.

GARY CRUICKSHANK, ET AL.,

Defendants, Appellees.

Before

Boudin, Chief Judge,
Torruella, Selya, Lynch and Lipez,
Circuit Judges.

ORDER OF COURT
Entered: April 5, 2002

Essentially for the reasons given by this court in its judgment, dated March 5, 2002, the request for a rehearing and/or rehearing en banc is denied.

By the Court:
Richard Cushing Donovan, Clerk

By: **JANICE M. O'NEIL**
Chief Deputy Clerk.

[cc: Messrs. Jacobi, McPherson, Schillesci and Gross]

APPENDIX K

11 U.S.C. § 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then —

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification

required under such subsection (a), unless such waiting period is extended —

(i) pursuant to subsection (e) (2) of such section, in the same manner as such subsection (e) (2) applies to a cash tender offer;

(ii) pursuant to subsection (g) (2) of such section; or

(iii) by the court after notice and a hearing.

(c) (1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless —

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2) (B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the

hearing under paragraph (2) (B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2) (B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if —

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if —

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the

debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) In any hearing under this section -

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest

APPENDIX L

11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c) (2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is —

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329 (b), 363 (n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of

or ordered transferred to the estate under section 510 (c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date —

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include —

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expi-

ration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. § 1001 et seq.; 42 U.S.C. § 275 1 et seq.), or any accreditation -status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that -

(A) (i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544 (a) (3) of this title; or

(B) (i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title; or

(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made —

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c) (1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law —

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial

condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a) (1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Supreme Court, U.S.
FILED
SEP 6 2002
OFFICE OF THE CLERK

No. 02-50

IN THE

Supreme Court of the United States

ANDREW J. KEHOE, JR. and JENNIFER M. KEHOE,

Petitioners,

v.

GARY CRUICKSHANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

In the underlying case, the United States Bankruptcy Court for the District of Massachusetts (the "Bankruptcy Court") authorized Gary Cruickshank, the Chapter 7 trustee (the "Trustee") of the estate of Andrew J. Kehoe and Catherine M. Kehoe (the "Debtors") to sell two parcels of real property, which the Bankruptcy Court had previously determined were property of the Debtors' bankruptcy estate. The Petitioners, the adult children of the Debtors, having failed to challenge the Bankruptcy Court's determination that the real property in question was property of the Debtors' estate despite having received adequate notice of the motion and the hearing thereon, subsequently challenged the Trustee's attempts to sell each of the properties. Having been unsuccessful in opposing the sales first before the Bankruptcy Court and thereafter before the United States District Court for the District of Massachusetts (the "District Court") and the Court of Appeals for the First Circuit (the "First Circuit"), the Petitioners now request this Honorable Court to grant it a writ of certiorari.

To justify their request for certiorari, the Petitioners assert that the First Circuit improperly applied Section 363(m) of the Bankruptcy Code (11 U.S.C. § 363(m)). Specifically, the Petitioners contend that the First Circuit inappropriately failed to recognize and apply the "measure of effective relief" exception to Section 363(m), and, moreover, that the First Circuit's ruling on that issue is in direct conflict with the decisions of other circuits on the issue. The Petitioners conclude that certiorari should be granted by this Court to resolve the conflict regarding the correct interpretation of Section 363(m) and the application of the "measure of effective relief" exception.

In response to the Petitioners' contentions, the Trustee asserts that there is no conflict among the circuits with respect to the correct interpretation of Section 363(m) or with regard to the application of the "measure of effective relief" exception thereto. Moreover, even assuming that this Court were to determine that such conflict does exist, the Petition For Writ Of Certiorari (the "Petition") presents a poor case for resolving the apparent "conflict" because: (1) the First Circuit does, in fact, recognize the "measure of relief exception", but declined to apply it in this instance based upon "the facts of this case"; and (2) throughout the entire proceeding, the Petitioners, on numerous occasions, failed to pursue the various procedural rights and remedies available to them to oppose the sales, and, their failure to pursue these rights should not, in essence, be rewarded by the granting of their Petition.

The final issue raised by the Petitioners is their assertion that the First Circuit incorrectly determined that their due process rights had not been violated in connection with the sale of the properties. The Petitioners request that this Court establish the due process requirements to be followed in connection with a sale of property in a bankruptcy proceeding.

The Trustee maintains that, based upon the facts and circumstances of this case, the First Circuit quite correctly determined that the Petitioners' due process rights were not violated. As the Court noted, the Petitioners "received due notice of all relevant actions before their rights were affected." Moreover, even a cursory review of the circumstances reveal that the Petitioners failed to pursue the procedural rights that were available to them to challenge the sales and, therefore, waived those rights.

The Trustee further notes that the Petitioners' explicit acknowledgment that the First Circuit decided the due process issue (although wrongly decided from the Petitioners' viewpoint), belies their underlying premise in their request for certiorari, namely, that the First Circuit simply dismissed their appeal as moot pursuant to Section 363(m). Had that in fact been the determination of the First Circuit, its ruling on the due process issue (as well as the other issues it decided in its opinion) clearly would have been unnecessary.

In their Statement of the Case, the Petitioners omit several significant facts which are relevant to this Court's determination whether to grant the Petitioners' request for certiorari. Accordingly, a brief description of the case and its factual background are set forth below.

The Debtors commenced the underlying bankruptcy proceedings on January 25, 1996 (the "Petition Date") by filing a joint voluntary petition for relief pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code"). On September 23, 1997, the Debtors' Chapter 11 petition was converted to a Chapter 7 case (the "Conversion Date").

As of the Conversion Date, the Debtors' assets included, *inter alia*, an interest in the JK Realty Trust, which held title to the real property located at 555 Ashmont Street, Dorchester, Massachusetts (the "Ashmont Street Property") and an interest in the Lafield-Bearse Realty Trust, which held title to the real property located at 5 Bearse Avenue, Dorchester, Massachusetts (the "Bearse Avenue Property"). On August 20, 1999, the Trustee filed the Trustee's Motion For Entry Of An Order Determining That Properties Held By The JK Realty Trust And Lafield-Bearse Realty Trust Are

Property Of The Estate, Or Alternatively, For An Order Authorizing Revocation Of Trusts (the "Trust Motion"). In that motion, the Trustee requested the Bankruptcy Court enter an order determining that the JK Realty Trust and the Lafield-Bearse Realty Trust were sham trusts and that the properties held by each of the trusts, namely, the Ashmont Street Property and the Bearse Avenue Property (collectively, the "Properties") were property of the Debtors' estate pursuant to Section 541 of the Bankruptcy Code. Alternatively, the Trustee requested the entry of an order authorizing him to revoke each of the trusts.

The Trust Motion was duly served upon all creditors, the Debtors, their counsel of record, and the Petitioners and their counsel of record. On August 30, 1999, the Trustee served notice of the hearing on the Trust Motion and the deadline for objections thereto, on all creditors, the Debtors, their counsel, and the Petitioners and their counsel. The Petitioners have never contended and do not now contend that they did not receive due and adequate notice of the Trust Motion and the hearing thereon. However, the Petitioners did not file an objection to the Trust Motion nor did they appear (or have counsel appear on their behalf) at the hearing on the Trust Motion. The Debtors alone filed an objection to the Trust Motion.

The hearing on the Trust Motion and the Debtors' objection thereto was held before the Bankruptcy Court on September 15, 1999. At the conclusion of the hearing, after consideration of the submission of the parties, the arguments presented at the hearing and the record in the proceeding, the Bankruptcy Court granted the Trust Motion, and read into the record its findings, rulings and basis for its decision. On September 23, 1999, the Bankruptcy Court entered its

formal order granting the Trust Motion and determining that the Properties were property of the Debtors' bankruptcy estate.[1]

Subsequent to the entry of the order by the Bankruptcy Court granting the Trust Motion, the Trustee initiated the process of selling both the Ashmont Street Property and the Bearse Avenue Property. The Petitioners have correctly indicated in the Petition the dates that the Trustee filed motions seeking authority from the Bankruptcy Court to sell each of these properties and the date of the orders entered by that court authorizing such sales. However, with respect to each of the sales, the Petitioners have again failed to provide this Court with all of the facts relevant to rendering a decision on the Petition.

With regard to the sale of the Ashmont Street Property, the Petitioners accurately note that on April 10, 2000, the Bankruptcy Court entered an order authorizing the Trustee to sell that property, and that the Petitioners objected to the sale and timely sought an appeal of the Bankruptcy Court's order. However, the Petitioners neglect to disclose that they failed to seek a stay of the order authorizing the sale from the Bankruptcy Court, the District Court or from the First Circuit. Since no stay had been requested or obtained by the Petitioners, on May 25, 2000 the Trustee consummated the sale of the Ashmont Street Property.

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1. A copy of the Order Determining That Properties Held By The JK Realty Trust And Lafield-Bearse Realty Trust Are Property Of The Debtors' Estate is attached as Appendix "A" to the Petitioners' Petition For Writ Of Certiorari. In that Order, the Bankruptcy Court found that the Petitioners had received proper, timely and sufficient notice of the Trust Motion and the hearing thereon, and that the Petitioners did not file any objection to the Trust Motion.

In view of the fact that the sale of the Ashmont Street Property had taken place, on July 12, 2000, the Trustee filed a motion with the District Court seeking to dismiss the Petitioners' appeal. In that motion, the Trustee asserted that the appeal had become moot because the Petitioners had not obtained a stay of the Bankruptcy Court's order authorizing the sale and that the sale of the property to a good faith purchaser had been consummated. Despite the fact that the Petitioners had sought and were granted an extension of the time to respond to the Trustee's motion to dismiss their appeal, the Petitioners failed to file any response to the motion to dismiss. In granting the Trustee's motion to dismiss the Petitioners' appeal, the District Court noted that no opposition had been filed thereto. (A copy of the District Court's order granting the Trustee's motion to dismiss the appeal and the Judgment of Dismissal of the Petitioners' appeal are annexed hereto in Appendix "A" and "B" respectively.)

With regard to the Bearse Avenue Property, on February 22, 2000, the Petitioners assert that they filed an appeal of the Bankruptcy Court's order authorizing the sale of that property by the Trustee and unsuccessfully sought a stay of that order. However, in the Petition, the Petitioners fail to disclose that they waited almost eight months after filing the appeal before seeking a stay of the sale order.

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE INTERPRETATION OF SECTION 363(m)

Section 363(m) of the Bankruptcy Code provides that:[2]

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Courts of appeal have uniformly held that in the absence of a stay pending appeal, Section 363(m) prevents an appellate court from overturning or invalidating an authorized and completed sale to a good faith purchaser of the property. *Wintz v. American Freightways, Inc. (In re Wintz Companies)*, 219 F.3d 807, 811 (8th Cir. 2000); *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1997); *In the Matter of Lloyd*, 37 F.3d 271, 273 (7th Cir. 1994).

The Petitioners do not suggest that there is any conflict among the circuits on the limitation that Section 363(m) places on the remedies available to appellate courts; rather,

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2. A copy of Section 363 of the Bankruptcy Code is annexed as Appendix "K" to the Petition.

the Petitioners assert that the conflict exists with respect to the application of the "measure of effective relief" exception to that statute. According to the Petitioners, the Third, Seventh and Tenth Circuits recognize the "measure of effective relief" exception to Section 363(m) and will not dismiss an appeal of a bankruptcy order authorizing a sale even if the appellants have failed to obtain a stay of the sale order if the appellate court can provide the appellant with some measure of meaningful relief.

The Petitioners assert that other circuits, namely, the Fourth, Fifth, and Eighth Circuits, apply a per se rule that if an appellant has failed to obtain a stay of an authorized sale and the sale is consummated, the entire appeal is moot. According to the Petitioners, these courts do not even address or recognize the "measure of effective relief" exception to Section 363(m). The Petitioners further contend that the First Circuit is among the circuits that apply the per se rule with regard to Section 363(m).

However, a careful examination of the recent decisions of the First, Fourth, Fifth and Eighth circuits cited by the Petitioners in support of their position reveals that no such conflict exists. Contrary to the position asserted by the Petitioners, these circuits do not simply apply a per se rule and dismiss the appeal where no stay of the sale order has been obtained. Instead, these decisions reflect that when presented with a request by appellants to apply the "measure of effective relief" exception, these courts address and recognize the existence of the exception to Section 363(m), but do not necessarily apply the exception if it is inappropriate to do so. Accordingly, contrary to the Petitioners' contention, no significant conflict exists with regard to the application of the "measure of effective relief" exception to Section 363(m).

In the *Wintz Companies* case, *supra*, the Eighth Circuit affirmed the order entered by the bankruptcy court which had authorized the sale of property to a third party. The appellants had requested a stay of the order authorizing the sale which request had been denied. Interpreting Section 363(m), the Eighth Circuit stated that as a general rule, in the absence of a stay of an order authorizing a sale, the statute prevents an appellate court from overturning a completed sale to a good faith purchaser. *Wintz*, 219 F.3d at 811. The Court noted that such rule not only protects the finality of bankruptcy sales, but "also reflects the inability of courts to supply a remedy once property has left the bankruptcy estate." *Id.* The Court further pointed out that once the property is sold any claims against the property may be maintained only against the proceeds of the sale.

It is clear that in its analysis, the Court in *Wintz* considered the issue of whether it would be appropriate to afford any type of relief to the appellants other than the overturning of the sale which it was precluded from doing by Section 363(m). This approach constituted an application of the "measure of effective relief" exception to Section 363(m) even though it was not labeled as such by the Court. However, in the appeal, the Court indicated that the appellants were not seeking recovery from the proceeds of the sale, but only to annul the sale. Accordingly, the Court held that the relief sought by the appellants was barred by Section 363(m) and affirmed the authorization of the sale of the property. The Court did not, as suggested by the Petitioners, simply dismiss the appeal as moot.

The Petitioners also cite the Fifth Circuit's opinion in *Ginther v. The Ginther Trusts (In the Matter of The Ginther Trusts)*, 238 F.3d 686 (5th Cir. 2001) and the Fourth Circuit's

decision in *Development Company of America v. Adamson Company, Inc. (In re Adamson Company, Inc.)*, 159 F.3d 896 (4th Cir. 1998) as further evidence of courts which do not recognize the "measure of effective relief" exception to Section 363(m). However, a close reading of each of those cases indicates that in each case, the appellants, who had failed to obtain a stay of the bankruptcy courts' orders authorizing the sales, were seeking only to overturn the respective sales. In each case, the appellants did not request any relief other than overturning the sales, which relief was barred by Section 363(m). In view of the limited relief sought by the appellants, the courts in these cases had no reason to determine whether any other relief could have been available to afford the appellants some "measure of effective relief". However, it can hardly be ascertained from the *Adamson Company* or the *Ginther Trusts* cases that the Fourth and Fifth Circuits would not address and/or recognize the "measure of effective relief" exception to Section 363(m) if such courts were presented with cases in which the appellants actually sought other relief in addition to seeking to invalidate authorized sales and the facts supported the granting of such other relief.

Finally, the Petitioners cite the decision by the First Circuit in the instant case as additional evidence that a conflict exists among the circuits with respect to the application of the "measure of effective relief" exception to Section 363(m). Based upon the decision entered by the First Circuit, the Petitioners conclude that the First Circuit does not address or recognize the exception to Section 363(m), and simply will dismiss an appeal as moot where the appellant has failed to obtain a stay of an order authorizing the sale of property. However, the Petitioners' reliance on the First Circuit's decision herein is misplaced.

An examination of the language of the First Circuit's opinion in the instant case in which it affirmed the orders authorizing the sales of the Properties, reflects that the Court did not simply apply a per se rule and dismiss the Petitioners' appeal as moot. Initially, the Court noted that since the Petitioners had failed to obtained a stay of the sale orders, "most of their claims to this court have been rendered moot." This statement obviously refers to the fact that the request by the Petitioners to undo the completed sales of the Properties was barred by Section 363(m), and rendered moot by that section. That interpretation of Section 363(m) is clearly consistent with the interpretation given to that statute by other circuits, all of whom recognize that Section 363(m) limits the remedies available to appellate courts where no stay of the sale order has been obtained.

However, the Court did not simply dismiss the Petitioners' appeal as moot because the sales of the Properties had been completed. Rather, the Court proceeded to address the other issues involved in the appeal, including whether it was appropriate to apply the "measure of effective relief" exception to Section 363(m). With regard to this specific issue, the Court concluded that based "on the facts of this case", it would not be appropriate to apply the exception. Thereafter, the Court addressed and ruled upon the other issues that had been raised by the Petitioners in their appeal, including whether the Petitioners were deprived of due process and whether the purchasers of the properties were good faith purchasers. The discussion engaged in by the Court and its rulings on those issues clearly reflect that the Court did not simply apply a per se rule and moot the Petitioners' appeal. Thus, the First Circuit's decision in the instant case lends no support whatever to the Petitioners' assertion that a conflict among the circuits exists with respect to the "measure of effective relief" exception.

II.

EVEN ASSUMING THAT A CONFLICT EXISTS WITH RESPECT TO THE APPLICATION OF SECTION 363(m), THE PETITION PRESENTS A POOR CASE FOR RESOLVING THE CONFLICT

Even assuming that this Honorable Court were to determine that a conflict among the circuits exists with regard to the application of the "measure of effective relief" exception to Section 363(m), the Petition presents a poor case for resolving the conflict. First, as described above, contrary to the Petitioners' assertion, the First Circuit addresses and recognizes the exception. The First Circuit determined that based upon the facts of the case it would not be appropriate to apply the exception in connection with the Petitioners' appeal. Thus, even if this Court were to grant the Petition and rule that the "measure of effective relief" exception was required to be addressed in appeals involving Section 363(m), such determination would provide no benefit to the Petitioners since the First Circuit has already addressed the exception in the instant case and determined that based upon the facts, it would not be appropriate to apply it.

Secondly, as noted above, the Petitioners have failed to pursue the numerous procedural rights available to them throughout the proceeding. Detailed above, these include a failure to initially object to the Bankruptcy Court's determination that the Properties were property of the Debtors' bankruptcy estate, a failure to seek a stay regarding the order authorizing the sale of the Ashmont Street Property, a failure to even contest the Trustee's motion to dismiss the Petitioners' appeal of the sale order regarding that property, and a failure to timely seek a stay with regard to the sale of

the Bearse Avenue Property. The Petitioners' failure to pursue the procedural rights otherwise available to them should not be rewarded by granting their Petition herein.

III.

THE PETITIONERS' ARGUMENT REGARDING THE ALLEGED VIOLATION OF THEIR DUE PROCESS RIGHTS WAS ADEQUATELY ADDRESSED AND REJECTED BY THE FIRST CIRCUIT

In the Petitioners' appeals of the orders of the Bankruptcy Court authorizing the sales of the Properties, the Petitioners asserted the same argument as they contend herein, namely, that the Bankruptcy Court was required to have proceeded by way of an adversary proceeding under Rule 7001 of the Federal Rules of Bankruptcy Procedure when it determined that the Properties were property of the Debtors' bankruptcy estate. In fact, that issue was fully briefed by the parties before the First Circuit. After a careful review of the parties' briefs and the record in the proceeding, the First Circuit rejected the Petitioners' contention and found that no due process violation of the Petitioners' rights had occurred. The Trustee submits that the First Circuit's determination on this issue is correct.

While a reiteration of the Trustee's argument why no due process violation of the Petitioners' rights occurred is not appropriate in the context of an opposition to the Petition,[3] one point should nevertheless be emphasized. It is not disputed by the Petitioners that they, and their counsel of

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3. In the event that the Petition were granted, the Trustee specifically reserves his right to fully address the due process issue.

record, received adequate and timely notice of the Trust Motion (which sought to determine that the Properties were property of the Debtors' estate), and the hearing thereon, and that the Petitioners failed to object to the motion and chose not to participate in the hearing on the motion. Such action by the Petitioners clearly constituted a waiver of their right to subsequently object to this procedure utilized by the Bankruptcy Court in selling the Properties. *In re Pence*, 905 F.2d 1107 (7th Cir. 1990).

CONCLUSION

For all of the foregoing reasons, the Trustee/Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS DATED OCTOBER 25, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Appeal No. 00-CV-11146-RCL
Bankr. Case No. 96-10559-WCH

In Re:

ANDREW J. KEHOE and CATHERINE M. KEHOE,

Debtor

THE MOTION* OF THE APPELLEE GARY W. CRUICKSHANK, CHAPTER 7 TRUSTEE, FOR AN ORDER DISMISSING THE APPEAL OF THE APPELLANTS ANDREW J. KEHOE, JR. AND JENNIFER KEHOE

Acting pursuant to and in accordance with the provisions of Rule 8011 of the Federal Rules of Bankruptcy Procedure, the appellee Gary W. Cruickshank, as he is the duly qualified and acting Chapter 7 trustee (the "Trustee") of the bankruptcy estate of Andrew J. Kehoe and Catherine M. Kehoe (the "Debtors"), hereby respectfully requests that this Court enter an order dismissing the appeal filed by the appellants, the Debtors' adult children, Andrew J. Kehoe, Jr. and Jennifer Kehoe (the "Debtors' Children") on the grounds that the appeal is moot.

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* Page 1 of the Motion.

Appendix A

In support hereof, the Trustee represents as follows:

FACTUAL AND PROCEDURAL BACKGROUND

1. On January 25, 1996, the Debtors filed a joint voluntary petition under Chapter 11 of the Bankruptcy Code (11 U.S.C. §101, *et seq.*) (the "Bankruptcy Code").

Lindsay, D.J.
MOTION ALLOWED; No opposition having been filed.
by the Court

s/ [illegible]
Deputy Clerk

APPENDIX B — JUDGMENT OF DISMISSAL OF THE UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS DATED OCTOBER 25, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 00-11146-RCL

In Re: ANDREW J. KEHOE
AND CATHERINE M. KEHOE

JUDGMENT OF DISMISSAL

LINDSAY, D.J.

In accordance with the Court's Order of *October 25, 2000* allowing the motion to dismiss of the appellee *Gary W. Cruickshank*, Judgment is hereby entered as follows: *Judgment for the Appellee Gary W. Cruickshank* dismissing this action.

October 25, 2000

s/ [illegible]
Deputy Clerk